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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION, and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,
Petitioners,

v.

ROLAND BUZENIUS

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

LYNN AGEE
CARL BUSH
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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29 U.S.C. § 158(a)(3)	*passim*

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD'S BRIEF IN OPPOSITION

The National Labor Relations Board in opposing our *certiorari* petition does not contest any of the "reasons for granting the writ" we set out in the petition. Instead, the Board claims that "resolution by this Court of the issue presented in this case is not warranted at this time" because the Board "has decided to reconsider its position" on the question presented here and the Board's reconsideration "may render obsolete any present disagreement among the court of appeals and any attendant uncertainty created by that disagreement." NLRB Br. in Op. pp. 6-7;

see also *id.* at pp. 9-10 (consideration of the question presented "would be premature in the present circumstances").

The Board's tacit admissions confirm that *certiorari* should be granted and its plea to put off to another day the necessary—and now all-but-inevitable—review in this Court of the question presented is unconvincing from beginning to end.

1. The argument in the Board's opposition brief begins by succinctly summarizing the petition's "reasons for granting the writ":

> Petitioners contend (Pet. 7-8) that the decision of the Sixth Circuit in this case is in accord with a decision of the Eighth Circuit . . . but conflicts with decisions of the District of Columbia, the Seventh, and the Ninth Circuits. [Citations omitted]. Petitioners further claim (Pet. 9) that the Sixth Circuit's decision "flies in the face of the plain language of [Section] 8(a)(3), that provision's legislative history and this Court's decisions construing that statutory language." Finally, petitioners argue that "the thousands of employers and unions, who for the last 40 years have negotiated union shop clauses in precisely the form provided by the NLRB, are left in complete uncertainty as to the continued validity of their agreements," absent resolution of the issue. Pet. 7. [NLRB Br. in Op. p. 6; footnote omitted.]

As to our conflict point, the Board goes on to *agree* that there is in fact a square conflict between the Sixth Circuit on the one hand and the D.C. and Seventh Circuits on the other. NLRB Br. in Op. p. 8, n.5. Moreover, as we show in the margin, the Board's effort to dispute our showing that the Eighth Circuit is aligned with the Sixth Circuit in this regard and that the Ninth Circuit is aligned with the D.C. and Seventh Circuits is strained in the extreme.[1]

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[1] The Board's brief in opposition, at p. 8 n.5, states that *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), is not properly aligned with

Equally to the point, the Board does not offer a word of rebuttal to our demonstration that the decision below is wrong as a matter of law and that the resulting circuit conflict has the most deleterious effect on the practice and procedure of collective bargaining—preferring instead the safety of a discrete silence.

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the decision below and that *Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1934 (9th Cir. 1997), pet. for cert. pending, No. 97-1056, is not properly aligned with *IUE v. NLRB*, 41 F.2d 1532 (D.C. Cir. 1994) and *Nielsen v. IAM*, 94 F.3d 1107 (7th Cir. 1996). According to the Board that is so because neither *Bloom* nor *Marquez* decided the "precise issue here—whether a clause requiring employees to become members of the union in good standing is facially unlawful absent further definition of the relevant terms." That pushes the word "precise" beyond its limits.

The court below, while recognizing that *Bloom* did arise in a distinguishable context, stated that *Bloom* provided "considerable insight" into the issue at hand, quoted from and analyzed the *Bloom* opinion at length, and cited *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995) as "applying *Bloom*" to support its ruling that "the [standard form] union security clause itself is unlawful." See Pet. App. 7a-9a. And, the court below did so to provide prior authority for *its* ruling that standard form "membership" union security clauses are invalid on their face. At the very least, then, *Bloom* is the precursor of, and the foundation for, the instant Sixth Circuit decision.

As to *Marquez*, the Board's brief in opposition, at p. 9, n.5, states that the "Ninth Circuit held that a union did not violate its duty of fair representation by negotiating a clause of the type challenged here, and although it relied on *IUE* and *Nielsen*, the court of appeals did not expressly rule on the facial validity of the clause." But *IUE*, *Nielsen* and *Marquez* all address claims that the union breached its duty of fair representation by negotiating a standard form "membership" union security clause that is allegedly invalid on its face in not spelling out the NLRA meaning of "membership"—and all three reject that claim on the ground that such clauses are validated by the first proviso to NLRA § 8(a)(3). The *Marquez* opinion states that the "NLRA by its very terms allows the inclusion of a union security term requiring union 'membership'," and then adds "two of our sister circuits have recently rejected claims from plaintiffs . . . like *Marquez* . . . [and have] held that terms requiring union membership continue to be permissible under federal law." 124 F.3d at 1038.

2. What the Board does do, as we have noted, is claim that the Agency, by reconsidering its long-standing, consistent position on the legal question presented here, can reach a new level of understanding that will still the present discord and that will facilitate—rather than exacerbate the present disruption of—the collective bargaining process. The hard realities belie that utopian vision.

(a) The "precise question at issue" here—and the question the Board has been spurred by the conflict in the circuits to reconsider—is, we submit, a question to which "Congress has directly spoken," and not a question as to which "the statute is silent or ambiguous." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Thus, the question here is one that in the final analysis is to be answered by the courts, "employing traditional tools of statutory construction," not one which turns on whether the agency's answer is based on a permissible construction of the statute." *Id.*

The first proviso to NLRA § 8(a)(3) states unequivocally:

> Nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . [29 U.S.C. § 158(a)(3).]

Thus, as this Court has observed, "agreements *requiring* '*membership*' in a labor union . . . are *expressly permitted* by the [first] proviso" to § 8(a)(3).[2] *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963) (emphasis added).

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[2] As we develop in our petition, the decision to proceed in the way § 8(a)(3) does—*viz.* through the first proviso to specify a lawful union security clause using "membership" as a term of art and through the other § 8(a)(3) provisos to place limits on the clause's enforcement without requiring that those limits be spelled out in

To be sure, the court below rejected the proposition that NLRA § 8(a)(3) means what it says and held that union security clauses phrased in the very statutory language of § 8(a)(3)—or in language that has been recognized for over 40 years as synonymous—rather than being "expressly permitted," are *invalid* on their face (because that statutory language, standing alone, does not clearly spell out the covered employees' rights and obligations).

But the statutory materials show: that the precise question presented here is one squarely governed by the NLRA as a matter of law; that the Sixth Circuit's construction of the § 8(a)(3) proviso is wrong as a matter of law; and that the court of appeals' construction of § 8(a)(3) would continue to be wrong as a matter of law if the Board, in reconsidering its long-standing (contrary) construction of § 8(a)(3), were to adopt the Sixth Circuit's position as the Board's own.

The NLRA for the most part is framed in broad general commands. It follows from that, as the Board's brief in opposition, at pp. 8-10, stresses, that the Agency in interpreting those commands is "entitled to 'considerable deference' in its interpretation of the Act." That is *not* true here. The first proviso to § 8(a)(3) deals with a discrete issue in specific terms. And, the limiting principle on judicial deference to an agency construction of its stat-

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the clause—represents a careful policy judgment in favor of maintaining industrial stability and of facilitating collective bargaining.

Thus, contrary to the Sixth Circuit's supposition, it was not the intent of Congress that a union security clause serve as a form of employee notice; rather as the words of the first proviso to § 8(a)(3) make clear, Congress intended that a union shop clause would serve the same office as the other terms of a collective bargaining agreement—the office of setting the rights and obligations of the parties to the contract, *viz.*, the employer and the union. And, of course, a clause that uses the formulation approved by Congress is obviously capable of lawful application and enforcement, and therefore, passes the test of legality that Congress set out in § 8(a)(3). *See* Pet. 9-10.

ute is that where "a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A.*, 467 U.S. at 843, n.9.

The sum of the matter is this. This case presents the purest possible question of statutory construction entrusted to the courts and one that has great practical import. It is supremely unlikely that Board reconsideration of the question and a *reaffirmation* of its present position would move the Sixth Circuit or the Eighth Circuit. And, given how contrary to the Act's plain language, its structure and the legislative history, the Sixth Circuit ruling here is, it is equally unlikely that the Board's acquiescence to that ruling would move the D.C. Circuit, the Seventh Circuit or the Ninth Circuit from their present position contrary to that of the decision below. That being so, for all the reasons stated in our petition, the time for this Court's review has come.

(b) We would be remiss if we failed to add two points of clarification.

First, nothing we have said is meant to imply that the Board should not have every opportunity to reconsider its position on the proper construction of NLRA § 8(a)(3) and its provisos and to do so in a manner and at a time that enables the Board to provide this Court with its present position prior to any decision by the Court on the question presented. We have no quarrel with the poposition that no matter how pure a question of statutory construction may be, the position of the agency entrusted with administering the statute, while not entitled to deference, is entitled to consideration and respect by the courts.

But there is no reason to believe that granting *certiorari* here will pretermit—or even inconvenience—such a reconsideration in this instance. The Board has already issued a decision in *Group Health Inc. and Gary Bloom*, 325 NLRB No. 49 (Jan. 30, 1998), one of the cases in

which the Board sought a court of appeals remand in order to reconsider its position on the question presented here, albeit without issuing a majority decision on that question. And, the Board has, as we understand it, other cases on this question under advisement.[3] Moreover, after stating its position on reconsideration in such a case the Board can then align itself either with petitioner or with respondent herein in the briefing and arguing of this case.

Second, as the three Board opinions in the Agency's third and latest *Bloom* decision indicate, the present adverse effects on the collective bargaining system noted in our *certiorari* petition, at pp. 5-7, are only the visible tip of the iceburg.

Bloom is a case in which the Board was called on to evaluate the propriety of a settlement agreement, pursuant to which the union and employer had negotiated a union security clause defining "membership," and three Board members limited themselves to that task. 323 NLRB No. 49, sl. op. pp. 1-4. But Chairman Gould, in a concurring opinion, reached the question presented here, concluded 'that union-security clauses requiring that an employee be a "member" of those terms are facially invalid," 323 NLRB No. 49, sl. op. p. 7, and "propos[ed] . . . a model union-security" that he would regard as valid on its face, *id.* at 6. Member Brame, in a dissenting opinion, agreed with Chairman Gould on the invalidity of all standard form "membership" union security clauses but parted ways with the Chairman on what is a valid clause. Despite what § 8(a)(3)'s first proviso says—that "[n]othing . . . precludes . . . an agreement . . . to require . . . [union] membership"—Member Brame concluded that any clause using the statutory language—even amplified with a definition of the statutory terms—is *invalid per se*. 325 NLRB No. 49 sl. op. pp. 7-9.

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[3] As we explained in the Petition, pp. 6-7 & n. 2, the Eighth Circuit allowed the Board ninety days in which to reconsider the Board's second decision in *Bloom*.

Plainly then, the process of implementing the Sixth Circuit's ruling here, if that is what the Board were to determine to do, is not a process that is going to run smoothly and surely. And, in the meantime, the thousands of parties to collective bargaining agreements containing standard form "membership" union security agreements would be without any authoritative legal guidance.

Moreover, even if the Board and the reviewing courts of appeals were to come to a consensus on the language of a model union security clause, they cannot, by a wave of the hand, insert that clause into agreements. The NLRA creates a system of free collective bargaining. Employers have the right to refuse to agree to changes in a collective bargaining agreement or to demand still other changes in exchange.

Thus, at the very least, adoption of the Sixth Circuit's ruling here on the NLRA law promises a period of collective bargaining conflict and instability. That, of course is precisely what Congress sought to prevent by permitting the traditional contract formulation signifying a lawful union security agreement that the legislature wrote into NLRA § 8(a)(3)'s first proviso.

II. MR. BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

Mr. Buzenius, the charging party before the NLRB who initiated this case, and a respondent in this Court, takes the position that

> the Court [should] grant certiorari on the issue presented by Petitioners, but not in this case. Indeed, this Court should deny the Petition in the case and grant the Petition in *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056), or, in the alternative, should grant the petitions in both this case and *Marquez* and summarily affirm in this case or consider them together. [Buzenius Mem. p. 1.]

For the purposes of these jurisdictional papers we believe that the following three responsive points suffice.

1. Mr. Buzenius recognizes both that there is a "widespread conflict among the circuits" on the question presented here, Buzenius Mem. pp. 10-12, and that this "question manifestly is important, both in principle and in practice," *id.* at 13.

2. Mr. Buzenius' claim that the "*Marquez* case, rather than this case, more concretely presents" that question, Buzenius Mem. pp. 13-14, is without substance. The reverse is true.

This case concerns the facial validity of a standard form "membership" union security clause of the kind found in thousands of collective bargaining agreements; the *Marquez* clause, in contrast, is *sui generis* insofar as it puts a gloss on the term "membership in good standing." *See* 124 F.3d at 1038 & n.2 (setting out the original and modified union security clauses in that case).[4]

This case has run its course and comes to the Court from a true final judgment. *Marquez*, in contrast, is at an interlocutory stage since the Ninth Circuit remanded there for district court consideration of two issues in factual dispute : whether the union breached its fair representation duty in enforcing the union security agreement by advising Ms. Marquez that she was required to join the union rather than that she had to meet her union financial obligation, and whether the union had an adequate system for notifying nonmember employees covered by a union security agreement of their right to object and pay only the collective bargaining portion of the normal union dues/agency fee amount. See 124 F.3d at 1041-43.

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[4] Given the Ninth Circuit's ruling that the original union security clause in *Marquez* was facially lawful without any definition of the phrase "member of the Union in good standing," the court of appeals did not consider whether the clause as modified during litigation provided a legally adequate definition of that phrase.

Finally, the question here, as we have stressed, is in its essence an NLRA § 8(a)(3) question and only derivatively a duty of fair representation question. It makes good sense, we submit, to decide that question in a case coming from the NLRB rather than one coming from a district court.

3. The bulk of Mr. Buzenius' memorandum, at pp. 4-9, is devoted to arguing that the decision below is right. That argument rather remarkably proceeds without ever confronting the statutory language or its legislative history. Beyond that, the points made in the memorandum are anticipated and rebutted at pp. 11-16 of our petition. At this stage, we rest on that showing since the proper place to bring this debate to closure is not in the *certiorari* papers but in the briefs on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNN AGEE
CARL BUSH
3340 Perimeter Hill Drive
Nashville, Tennessee 37211

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for Petitioners